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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. [redacted] 5 1

MAJOR RAYMOND LISENBA,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF

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In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1940

No. 134

MAJOR RAYMOND LISENBA,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of the Stat of California

RESPONDENT'S BRIEF

STATEMENT

This is a companion case to the cause entitled *Major Raymond Lisenba, Petitioner,* vs. *The People of the State of California,* October Term, 1940, No. 133. The present cause arose from an order made and entered by the Supreme Court of the State of California denying without prejudice petitioner's application for a writ of habeas corpus;

whereas cause No. 133 arose from the judgment made and entered by said Supreme Court affirming the judgment of conviction.

In respondent's brief filed in cause No. 133, we set forth the history of the case and reference to the opinions rendered by the court below, statement of the points upon which petitioner relied, a statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, and respondent's argument.

The same points are presented by petitioner in the instant cause as were presented by him in cause No. 133, except that he has added three additional matters which we shall later comment on herein. The same authorities are relied upon by him together with several additional authorities.

The entire records, files and exhibits before the Supreme Court of the State of California on the appeal from the judgment and order de ying a new trial were, by reference, made a part of the petition for a writ of habeas corpus (R. 15), and the petition was considered upon all records, files and proceedings in the trial and subsequent to the trial. (R. 28.) By stipulation of the parties, the record in cause No. 133 may also be considered the record in cause No. 134. (R. 32.)

POINTS RELIED UPON BY PETITIONER

The points relied upon herein by petitioner, in the order set forth in his brief, are as follows:

I. That a judgment of conviction for murder resting upon confessions shown to have been extorted by officers of the State by torture of the accused violates the procedural due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States, and such judgment is void;

II. That the bringing of live, hissing, writhing rattlesnakes into the court room during the trial of the case was an appeal to the passions and prejudices of the jury and made the whole proceeding but a mask and pretense of a trial;

III. That use of evidence from the State of Colorado in the State of California to prove a collateral and disconnected offense was without notice and without opportunity to defend, and therefore was a deprivation of due process of law;

IV. That a conviction obtained by perjured testimony is void under the due process clause of the Fourteenth Amendment of the Constitution of the United States;

V. That deprivation of counsel after an arrest in California is a deprivation of due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States;

VI. That all of these acts constitute hostile discrimination, oppression and inequality, and therefore violate the equal protection clause of the

Fourteenth Amendment of the Constitution of the United States;

VII. That the inhibition contained in the Fourteenth Amendment has exclusive reference to State action and means that no officer or agent by whom its powers are exerted shall deny to any person within its jurisdiction the equal protection of the laws. In this case officers of the law, acting as agents for the State, denied such equal protection, as did the Court during the trial of the case;

VIII. That under the circumstances petitioner was denied due process of law in that the trial court possessed no jurisdiction to enter judgment;

IX. That the decision of the Supreme Court of California is itself therefore a denial of due process of law and the equal protection of the laws.

ARGUMENT

I. THAT A JUDGMENT OF CONVICTION FOR MURDER RESTING UPON CONFESSIONS SHOWN TO HAVE BEEN EXTORTED BY OFFICERS OF THE STATE BY TORTURE OF THE ACCUSED VIOLATES PROCEDURAL DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES. AND SUCH JUDGMENT IS VOID

The record does not show that petitioner made any confession by reason of torture or any other form of compulsion. In respondent's brief filed in cause No. 133, we have fully presented the evidence relative to the manner in which the confes-

sions were obtained and discussed the authorities presented by petitioner in his brief under this point. The evidence in the instant case does not present a situation in anywise comparable to that found in *Chambers* vs. *Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716; *Brown* vs. *Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682; *Canty* vs. *Alabama*, 309 U. S. 629, 60 S. Ct. 612, 84 L. Ed. 988; *White* vs. *Texas*, 310 U. S. 530, 60 S. Ct. 1032, 84 L. Ed. 1342; *Ziang Sung Wan* vs. *United States*, 266 U. S. 1, 45 S. Ct. 1, 69 L. Ed. 131; *People* vs. *Dye*, 119 Cal. App. 262; or *Downer* vs. *Dunaway*, 53 Fed. (2d) 586, cited by petitioner. All of the above cases were cited by petitioner in his brief in cause number 133.

The additional authority of *Rounds* vs. *State*, 106 S. W. (2d) 212, is cited herein by petitioner. The facts in the instant case are not comparable to those found in *Rounds* vs. *State*, for in that case the defendant was deprived of sleep for four days and nights, which the Court stated was a form of torture not less severe than physical violence.

II. THAT THE BRINGING OF LIVE, HISSING, WRITHING RATTLESNAKES INTO THE COURTROOM DURING THE TRIAL OF THE CASE WAS AN APPEAL TO THE PASSIONS AND PREJUDICES OF THE JURY AND MADE THE WHOLE PROCEEDING BUT A MASK AND PRETENSE OF A TRIAL

The evidence regarding the introduction in evidence and exhibiting to the jury of two live rattle-

snakes has been fully presented by respondent under Point II of its brief filed in cause No. 133. We there pointed out that the rattlesnakes introduced in evidence and exhibited to the jury were the identical rattlesnakes used by petitioner upon Mary James, his wife, as a contributing cause to her death. All the facts and circumstances surrounding the purchase of the snakes by the accomplice Hope, the special contraptions or boxes constructed for their safekeeping, the careful manner in which they were brought into the court and exhibited to the jury, and their immediate removal from the court room, have been set forth in detail in respondent's brief under this point in cause No. 133. None of the authorities cited by petitioner under this point makes the procedure thus alluded to a violation of the due process clause of the Fourteenth Amendment of the United States.

The authorities are to the effect that instrumentalities used in the commission of the offense, when properly identified, are admissible in evidence as part of the res gestae, to illustrate and corroborate the testimony of witnesses, and to demonstrate the method of the crime.

California Code of Civil Procedure, section 1954;

8 Cal. Jur., pp. 140-145;

Jones Commentaries on Evidence, 2d Edition, Vol. 3, pp. 2518 and 2520;

Wigmore on Evidence 2d Edition, Vol. 2, pp. 679-682, par. 1157;

People vs. *Green*, 13 Cal. (2d) 37, 42, 43

III. THAT USE OF EVIDENCE FROM THE STATE OF COLORADO IN THE STATE OF CALIFORNIA TO PROVE A COLLATERAL AND DISCONNECTED OFFENSE WAS WITHOUT NOTICE AND WITHOUT OPPORTUNITY TO DEFEND, AND THEREFORE WAS A DEPRIVATION OF DUE PROCESS OF LAW

Respondent's brief filed in cause No. 133 sets forth in detail the evidence relative to the death of a former wife of petitioner and the circumstances connected therewith which established indubitably a motive and scheme on the part of petitioner to financially enhance himself by insuring the life of a young woman and thereafter marrying and killing her. Respondent has set forth the authorities in said brief which announce the rule and the reasons why such evidence is admissible.

The evidence in the case, pointed out in respondent's brief in cause No. 133, shows that petitioner had due notice that such evidence would be introduced against him at his trial, and that he was accorded every opportunity to defend himself against such evidence.

None of the authorities cited by petitioner in his brief under this point has any relation to the situation presented by the facts in the instant case.

Proof of the circumstances of the death of petitioner's former wife in Colorado was proper and relevant evidence to controvert petitioner's claim of accident or death in an attempt to commit an

abortion, and is also admissible where the evidence is susceptible to such an inference.

People vs. *Craig*, 111 Cal. 460, 468, 469;
People vs. *Morani*, 196 Cal. 154, 160;
Commonwealth vs. *Snell*, 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019;
Holt vs. *United States*, 42 Fed. (2d) 103, 106, 107;
R. vs. *George Joseph Smith*, XXI Crim. App. Rep. 229, 236.

IV. THAT A CONVICTION OBTAINED BY PERJURED TESTIMONY IS VOID UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

The Supreme Court of the State of California had before it in connection with the application for a writ of habeas corpus all of the evidence in the case as well as the affidavits of the accomplice Hope, filed nearly three years after his plea of guilty, wherein he stated that his testimony given at the trial was false and known to the prosecution to be false. Upon such record there was a hopeless conflict in the evidence as raised by these affidavits of the accomplice Hope and the Supreme Court of the State of California resolved such conflict against petitioner by denying without prejudice said application, which action of said Supreme Court has not foreclosed the petitioner from again presenting the matter upon a proper and sufficient showing.

Mooney vs. *Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 794.

Petitioner under this point has cited the case of *Jones* vs. *Commonwealth of Kentucky,* 97 Fed. (2d) 335, which he did not cite in his brief in cause No. 133. In that case the Attorney General of Kentucky was strongly inclined to the view that Tom Jones was convicted on perjured testimony. Such is not the situation in the instant case. Here, the Attorney General is of the view that the testimony of the accomplice Hope was not false and therefore petitioner was not convicted on perjured testimony.

V. THAT DEPRIVATION OF COUNSEL AFTER AN ARREST IN CALIFORNIA IS A DEPRIVATION OF DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

Respondent in its brief in cause No. 133, has set forth the evidence under this point, which evidence shows that petitioner was not deprived of counsel at any stage of the proceedings against him. In fact, this evidence shows that he had the benefit of counsel the day following his arrest on Sunday on the charge of incest, that his counsel was present in court at the time of petitioner's arraignment on said charge of incest, which arraignment took place within two days after his arrest.

The record shows a situation in respect of counsel which is in no way analogous to that present in *Powell* vs. *Alabama,* 287 U. S. 45, 53, S. Ct. 55, 77 L. Ed. 158, cited by petitioner under this point.

VI. THAT ALL OF THESE ACTS CONSTITUTE HOSTILE DISCRIMINATION, OPPRESSION AND INEQUALITY, AND THEREFORE VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

Petitioner, under this point in his brief filed in cause No. 133, contended that he was denied equal protection of the law when the officers took him to a private house adjoining his home and showed him the dictograph apparatus and by Officer Southard committing battery upon him; also that he was unjustly discriminated against by reason of the confessions, the rattlesnakes and the Colorado affair being introduced in evidence.

In respondent's brief filed in said cause No. 133, we pointed out that the equal protection clause of the Fourteenth Amendment of the Constitution of the United States has to do with the application of laws and not with individual invasion of individual rights; that mere error of judgment on the part of officials will not support a claim of discrimination, and that the equal protection clause has to do with intentional and systematic discrimination by the law itself or by those charged with its enforcement.

Civil Rights Cases, 109 U. S. 3, 9;
Sunday Lake Iron Co. vs. *Township of Wakefield*, 247 U. S. 350, 352, 62 L. Ed. 1154;
Smith vs. *State of Texas*, 61 S. Ct. 164, 165.

VII. THAT THE INHIBITION CONTAINED IN THE FOURTEENTH AMENDMENT HAS EXCLUSIVE REFERENCE TO STATE ACTION AND MEANS THAT NO OFFICER OR AGENT BY WHOM ITS POWERS ARE EXERTED SHALL DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS. IN THIS CASE OFFICERS OF THE LAW, ACTING AS AGENTS FOR THE STATE, DENIED SUCH EQUAL PROTECTION, AS DID THE COURT DURING THE TRIAL OF THE CASE

This is merely a restatement of Point No. VI and our answer there is our answer here.

VIII. THAT UNDER THE CIRCUMSTANCES PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT THE TRIAL COURT POSSESSED NO JURISDICTION TO ENTER JUDGMENT

Respondent's answer to this matter is that the record shows that petitioner was not denied due process of law and that therefore the trial court did possess and never lost jurisdiction to enter judgment.

IX. THAT THE DECISION OF THE SUPREME COURT OF CALIFORNIA IS ITSELF THEREFORE A DENIAL OF DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS

This is a mere repetition of previous contentions made by petitioner. There is not one instance shown where due process of law was denied to petitioner at any time during his trial or at the con-

clusion thereof. The record shows that he was accorded all his rights as guaranteed by the Constitution of the United States and by the Constitution of the State of California from the time of his arrest to and including the time of his conviction and sentence.

CONCLUSION

As shown in respondent's brief in case No. 133, petitioner herein at no time and in no manner was denied those rights to which he is entitled under the Fourteenth Amendment of the Constitution of the United States. His confessions were not obtained by force, threats, duress or other compulsion; but were voluntarily made at a time, place and to persons selected by himself. He had advice of counsel, and was not held incommunicado. The introduction in evidence of the instrumentalities purchased for and used in the cold blooded and heartless murder of his wife was proper. The proof of the circumstances of the death of petitioner's former wife in Colorado was proper and relevant evidence to show motive, plan and scheme, and to controvert petitioner's claim of accident or death in an attempt to commit an abortion. Petitioner was shown by overwhelming evidence to be guilty of the crime charged. No satisfactory showing was made to impel the Supreme Court of California to conclude that the witness Hope had perjured himself; the weight of the evidence presented to

said court being to the opposite effect. The action of the Supreme Court of California in denying the petition for writ of habeas corpus was therefore proper.

For the foregoing reasons respondent submits that the decision of the Supreme Court of California denying the petition for writ of habeas corpus should be affirmed.

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